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No. 05-431

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In The

Supreme Court Of The United States

JOHN P. BURKE, in his official capacity as the Banking Commissioner of the State of Connecticut,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN REPLY TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED FOR REVIEW

1. Is the interpretation of the Office of Comptroller of the Currency as to the preemption of state law under the National Bank Act entitled to judicial deference?

2. Do the provisions of the National Bank Act and the regulations promulgated thereunder by the Office of Comptroller of the Currency preempt state law licensing and regulatory authority over state-chartered operating subsidiaries of national banks?

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INTRODUCTION

The petitioner, John P. Burke, in his official capacity as Banking Commissioner of the State of Connecticut, respectfully submits this supplemental brief in reply to the Brief of the United States as Amicus Curiae submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. Particularly as to the merits, the United States' amicus brief does little more than parrot the arguments of the respondents, entities that are subject to the regulatory authority of the Office of the Comptroller of the Currency (OCC) under the National Bank Act. Nonetheless, the petitioner takes this opportunity to respond briefly to an issue of paramount importance to the States that the United States unfortunately and unwarrantedly belittles: Whether the doctrine of judicial deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), should be applied to an agency's self-interested interpretation of the scope of its preemptive authority granted by Congress.

ARGUMENT

I. THE OCC'S SELF-INTERESTED INTERPRETATION OF THE SCOPE OF ITS PREEMPTIVE AUTHORITY DOES NOT DESERVE JUDCIAL DEFERENCE.

Judicial review of the scope of an agency's preemptive authority should not be limited to evaluating merely whether the agency's view of its own preemptive authority is unreasonable. Preemption of state law invariably raises fundamental issues of federalism, and federal agencies have

neither any special competence nor the institutional incentive to respect the interests of States in addressing the scope of congressionally authorized preemption.

The United States is wrong in asserting that the petitioner did not raise the issue of *Chevron*'s application to an agency's view of the scope of its preemptive authority. U.S. Br. 18. The petitioner specifically argued below that *Chevron* should not apply to the regulation, which effectively is nothing more than a statement of the OCC's prediction of how the courts would decide the issue. *See* Pet. App. A24-A25; Pet. C.A. Br. 35-36.

Similarly, the United States is wrong in dismissing the presence of an inter-circuit split of authority. U.S. Br. 19-20. Contrary to the United States' assertion that the court of appeals below did not apply *Chevron* deference in upholding § 7.4006, *id.* at 20, the court explicitly stated that it "must defer to the regulations if they reflect a reasonable construction of the statutory scheme." Pet. App. A22. This stands in stark contrast to the Tenth Circuit's approach in *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571 (10th Cir. 1991), in which the court declined to defer to an agency's view of preemption.

The United States attempts to distinguish *Harmon* on the basis that the agency interpretation at issue there involved implied conflict preemption. U.S. Br. 20. That is a distinction without a difference. Indeed, the rationale offered by the Tenth Circuit for eschewing deference – that "a preemption determination involves matters . . . more within the expertise of the courts than within the [agency's] expertise," *Harmon*, 951 F.2d at 1579 – had nothing to do with the category of preemption involved but rather the legal nature of the inquiry. By contrast, the Second Circuit

concluded that the preemption determination in this case should be treated like any other agency policy decision to which it must defer.[1] Pet. App. A23-A25.

Finally, the United States is wrong in suggesting that this issue is controlled by the Court's decision in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). U.S. Br. 18. In *de la Cuesta*, this Court suggested that when an agency's regulation intends to preempt state law, a "narrow focus on Congress' intent to supersede state law [is] misdirected." *de la Cuesta*, 458 U.S. at 154. However, the Court also unequivocally reaffirmed, both in *de la Cuesta* and in numerous cases thereafter, that the scope of an agency's preemptive authority remains a question of congressional, not agency, intent. *Id.* at 153-54; *Gonzalez v. Oregon*, 126 S.Ct. 904, 916 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, what is definitely not "misdirected" is an inquiry into whether the agency's action is within the scope of its delegated authority. As the Court just recently

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[1] The petitioner acknowledges that the other decision cited in his petition as reflecting a split among the circuits – *BankWest, Inc. v. Baker*, 411 F.3d 1289 (11th Cir. 2005), *vacated as moot*, 2006 U.S. App. Lexis 10580 (11th Cir. Apr. 28, 2006) – has since been vacated on other grounds as moot. Nonetheless, the United States' effort to distinguish the holding of *BankWest* is unpersuasive. The United States contends that *BankWest* only held that deference is not owed to an agency's informal view of preemption, as opposed to that articulated in a regulation. U.S. Br. 19-20. Again, for purposes of establishing the standard of judicial review, that is a distinction without a difference. As in *Harmon*, the court's decision not to defer to the agency depended not on the form of the agency's view, but rather on the nature of the inquiry and the judicial competence to resolve preemption questions. *BankWest*, 411 F.3d at 1301 ("[W]e do not defer to agency positions, ***whether formal or informal***, on preemptive issues." (emphasis added)).

emphasized in *Gonzalez v. Oregon*, an agency's interpretation receives deference under *Chevron* only when an agency has acted within the scope of its congressionally delegated authority. 126 S.Ct. at 916; *accord Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374.

The regulation at issue in *de la Cuesta* was a substantive one – specifically, a rule on the ability of a federal savings and loan to include a due-on-sale clause in a loan instrument. The Court concluded that the promulgation of that regulation was well within the exceedingly broad scope of that agency's preemptive authority. *de la Cuesta*, 458 U.S. at 161-63. Because the regulation was within the scope of the congressionally delegated preemptive authority – as determined by an ordinary exercise of interpretation of the statutory text and congressional intent, *id.* at 159-64 – the Court concluded that was no need to identify a specific congressional intent to preempt state law on that specific issue. *Id.* at 163.

By contrast, the regulation at issue in this case is not a substantive one; rather, it purports to define the scope of the agency's delegated preemptive authority. Indeed, in promulgating the 12 C.F.R. § 7.4006, the OCC pointedly stated that the regulation "itself did not effect preemption of any State law;" but instead the regulation only reflected the OCC's view of how the federal courts would rule as to the scope of the National Bank Act's preemptive scope. 66 Fed. Reg. 34784, 34790 (July 2, 2001).

The United States fails to accept the significance of this. The issue that § 7.4006 addresses is ***not*** "the substantive scope of the 'business of banking' conducted by national banks," U.S. Br. 19, to which the courts must defer to the reasonable policy judgments of an agency

given preemptive authority by Congress. Rather, it purports to define the scope of the agency's preemptive authority. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996). The reasonableness or soundness of an agency's policy judgments as to the scope of preemption are irrelevant. What is at stake is whether the agency has exceeded its delegated preemptive authority, and as to that question no judicial deference is accorded. *Gonzalez*, 126 S.Ct. at 916; *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374.

In *Chevron*, the Court articulated two justifications underlying the doctrine of deference that now bears its name: first, that agencies have superior expertise in the area of regulation delegated to them than the courts; and second, that agencies, as part of the politically accountable executive branch, are better suited to resolve competing policy questions left to them by Congress. *Chevron*, 467 U.S. at 865. Both of these justifications, grounded in concerns of separations of power and judicial competency, are highly attenuated when the issue is the scope of an agency's preemptive authority.

Determining the scope of preemptive authority that Congress delegated to an agency is not the sort that requires technical expertise that agencies have and courts lack. After all, the scope of an agency's preemptive authority is answered by "interpreting the statute to determine whether Congress has given the [agency] the power to act as it has." *New York v. FERC*, 535 U.S. 1, 18 (2002). This is a task that courts perform every day, and agencies have no special competency to decide such questions.

In fact, there is compelling evidence to suggest that agencies are less competent than courts to resolve such

issues in a way that also undermines the assumption that agencies are more politically accountable and thus better suited to resolve competing policy interests. The question of the scope of an agency's preemptive authority can go to the heart of the agency's power, and there is every reason to believe that agency self-interest will outweigh the federalism values intrinsic to questions of preemption. *See* Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 785-96 (2004); authorities cited in Pet. 14-15.

Chevron deference is simply ill-equipped for such circumstances. Courts should therefore address agency interpretations of the scope of preemption without according those interpretations the deference given other agency decisions.

II. BY ADVOCATING FOR JUDCIAL DEFERENCE TO THE OCC'S INTERPRETATION OF PREEMPTION UNDER THE NATIONAL BANK ACT, THE UNITED STATES SUPPORTS THE OCC'S EFFORTS TO REWRITE THE LIMITS CONGRESS HAS PLACED ON STATE VISITORIAL AUTHORITY.

The views expressed by the United States effectively would permit the OCC to rewrite the National Bank Act and specifically the meaning of the term "national bank" as used in 12 U.S.C. § 484. To avoid the obvious – that an operating subsidiary of a national bank is not itself a national bank – the United States asserts that the OCC did not interpret the meaning of "national bank" to include operating subsidiaries but rather merely interpreted that the use of operating subsidiaries was within the "incidental powers" of a national bank under 12 U.S.C. § 24(Seventh). U.S. Br. 14-15.

The petitioner has not contested a national bank's authority under the National Bank Act to own and operate an operating subsidiary. It does not follow, however, that simply because a national bank has such authority that the OCC can by regulation extend the preemption of state law to operating subsidiaries. The United States argues that "[n]othing in the text of the statute precludes" the OCC's view that the States should be preempted from exercising regulatory authority over operating subsidiaries. U.S. Br. 15. The statutory framework belies that assertion. The National Bank Act unambiguously defines a national bank and an affiliate of a national bank, and there is no dispute that an operating subsidiary is an affiliate and not a national bank. 12 U.S.C. §§ 26, 27, 221, 221a. The National Bank Act's statutory framework unambiguously treats the regulation of a national bank and its affiliates separately, preempting certain state laws as to national banks but not as to affiliates. 12 U.S.C. §§ 371, 481, 484(a). *See* Pet. 23-26.

Against this statutory backdrop, it is nothing more than an administrative bootstrap to conclude that, because the use of an operating subsidiary is an incidental power of a national bank, the preemption of visitorial authority as to national banks established by Congress extends also to operating subsidiaries. Whether or not such an extension of preemptive authority is a "reasonable conclusion," U.S. Br. 15, is not the question where, as here, the statutory language, as interpreted through the ordinary rules of statutory construction, cannot bear the weight of the agency's interpretation. *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000);

MCI Telecom. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 229 (1994).

In the guise of judicial deference, the United States asks that this Court accede to the OCC's rewriting of the National Bank Act. Given the significance of enabling an administrative agency to exceed its congressionally delegated authority at the expense of otherwise validly enacted state law, this Court should step in to resolve this important issue.

CONCLUSION

The petitioner respectfully submits that his Petition should be granted and a writ of certiorari should be issued to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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